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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER

KASHNIKOW, ERIK

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

12/24/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/591,126	<b>Applicant(s)</b> THOMASSET, JACQUES	
	<b>Examiner</b> ERIK KASHNIKOW	<b>Art Unit</b> 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 14 October 2008.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-14 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-14 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## DETAILED ACTION

### ***Claim Rejections - 35 USC § 102***

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

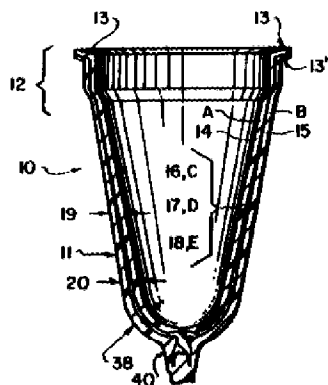
A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1, 2, 4-9 and 11-12 are rejected under 35 U.S.C. 102(b) as being anticipated by Kudert et al. (US 6,332, 767).

3. Examiner notes that the line “for the realization of multilayer objects by compression molding” is an intended use of the dose, and does not carry any weight regarding patentability. It has been determined that where a patentee defines a structurally complete invention in the claim body and uses the preamble only to state a purpose or intended use for the invention, the preamble is not a

**FIG.1A**

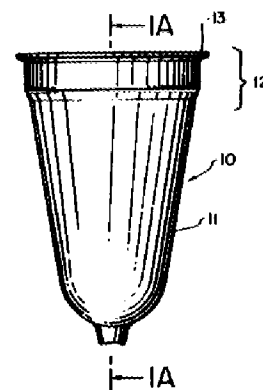


claim limitation (See MPEP 2111.02 and *Kropa v. Robie*, 187 F.2d at 152, 88 USPQ2d at 480-81).

4. Examiner points out that claims 6-12 (of which only 6-9 and 11-12 are dealt with in this section) will be treated as product by process claims (for more information on product by process claims see MPEP 2113).

5. In regards to claims 1 and 5 Kudert et al. teach a parison (which correlates to Applicant's Dose), which comprises 2 outer layers which may or

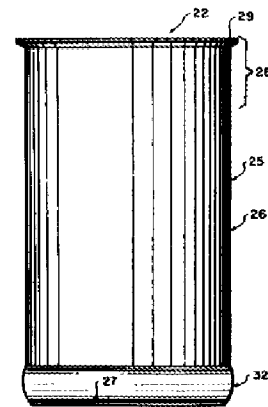
**FIG.1**



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may not be the same (column 27 lines line 48- column 28 line 1), and 3 inner layers, one being a barrier layer and the other two, on either side of the barrier layer are adhesive layers (column 27 line 48 column 28 line 19). Figures 1 and 1A show an example of this parison, and indicate that it would have an axis of symmetry, with 14 and 15 representing the outer layers, C the barrier layer, and D and E the other two on the other side of the barrier layer.

FIG.2



6. In regards to claims 2 and 4 Figures 1 and 1A show that the parison has a concave surface, which has an opening which acts as the orifice (where an orifice is defined by dictionary.com

(<http://dictionary.reference.com/browse/orifice>) as a mouth like opening or hole also

Figs. 1 and 1A). It is also pointed out that Kudert et al. teaches that these parisons are formed by Injection molding, which involves heating the polymers (column 35 line 65 column 36 line 15). It is therefore inherent that at the time of their creation the polymers and therefore the parisons are in the melt state.

7. In regards to claim 6 Kudert et al. teach containers for the packaging of food which requires low oxygen and moisture permeability (column 1 lines 30-40).

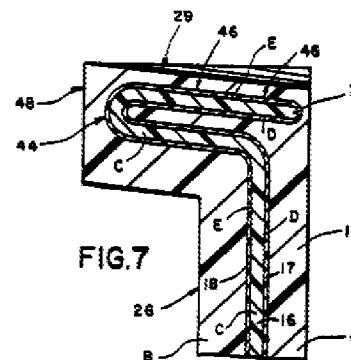
8. Kudert teaches an embodiment wherein the container comprises a structure layer and a barrier layer embedded within the structural layer (column 122 line 5-10 and column 7 line 52 column 8 line 7).

9. In regards to claim 6 Kudert et al. teach an embodiment wherein the article is a can shaped container (Fig. 2), and teach that the barrier layer (in this case the functional layer) has a fold in it (Fig 6 and 7).

10. In regards to claim 7 since the object is symmetrical and a body of revolution can be defined (and is being defined by Examiner) as any body that can rotate around the axis of symmetry, then the functional layer, would also be symmetrical around the axis of symmetry and would be able to rotate around said axis by rotating the container about the axis of symmetry.

11. In regards to claim 8 and 9 Fig 2 is an open container, and as shown in Fig 2 the opening, as it is in can shaped objects, is centered around the axis of symmetry (Fig. 2 and column 19 lines 37-38), and therefore the body of revolution is open.

12. In regards to claims 11 and 12, Fig. 2A shows an embodiment wherein the object is closed by a cap, which eliminates the orifice, and makes the object closed around the axis of symmetry (Fig. 2A and column 19 lines 39-40).



### ***Claim Rejections - 35 USC § 103***

13. The following is a quotation of 35 U.S.C. 103(a)

which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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14. Claims 3 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kudert et al. (US 6,332, 767).

15. As stated above Kudert et al. teach parisons with a concave surface and articles which have a folded barrier layer within, however they are silent regarding parisons or articles in which the orifice forms a passage through the article.

16. Kudert et al. teach that this invention is for forming "containers as broadly meant" (column 28 lines 35-37). This would include pipes, which would have an orifice which forms a passage through said article. One would be motivated to form pipes from this articles to fit that which needs to be stored or to fit the needs of transferring that which needs to be stored from one container to another. It would be well within the ability of one of ordinary skill in the art to form a parison of the referenced invention with an orifice that forms a passage way through said parison, and further turning said parison into a pipe like container.

17. Claims 13 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Van Schaftingen (US 6,808,673).

18. Van Schaftingen teaches a method of making hollow bodies of a multi layer thermoplastic nature, and the articles themselves (column 1 lines 7-9). Van Schaftingen teaches that the articles have a concave surface to them (column 3 lines 1-10).

19. In regards to claims 13 and 14 Van Schaftingen teaches that the articles are made by a coextrusion (column 2 lines 38-45) method wherein the thermoplastic layers

are extruded into a mold, wherein the mold starts out rectilinearly and then narrows, which would form the concave surface (claim 1).

20. While Van Schaftingen is silent regarding the means for forming the concave surface they are silent regarding the molds in this case sliding inside the pathway. However it would be obvious to one of ordinary skill in the art at the time of the invention to call the rectilinear part of the mold the passageway, and the narrowing part the means for forming the concave surface, as they are attached it is an obvious variant of one sliding into the other.

### ***Response to Arguments***

21. Applicant's arguments, see arguments, filed 10/14/08, with respect to the abstract objection have been fully considered and are persuasive. The objection of the abstract has been withdrawn.

22. Applicant's arguments, see arguments, filed 10/14/08, with respect to the 35 U.S.C. 112 2<sup>nd</sup> paragraph rejection of the claims have been fully considered and are persuasive. The 112 2<sup>nd</sup> paragraph rejections of the claims have been withdrawn.

23. Examiner notes that the related applications submitted by Applicant have been considered as indicated by the search notes.

24. In regards to Applicant's arguments that a parison is different than a dose the examiner agrees and notes that the Examiner has only stated in the office action that the parison of Kudert "correlates" to Applicant's dose. Further, it is noted that not all

claims are drawn to a multilayer dose but also to a multilayer object on which Kudert's parison would clearly read.

25. In regards to claims 1-5 while there is no disclosure that the parison is a dose as presently claimed, applicants attention is drawn to MPEP 2111.02 which states that "if the body of a claim fully and intrinsically sets forth all the limitations of the claimed invention, and the preamble merely states, for example, the purpose or intended use of the invention, rather than any distinct definition of any of the claimed invention's limitations, then the preamble is not considered a limitation and is of no significance to claim construction". Further, MPEP 2111.02 states that statements in the preamble reciting the purpose or intended use of the claimed invention must be evaluated to determine whether the purpose or intended use results in a structural difference between the claimed invention and the prior art. Only if such structural difference exists, does the recitation serve to limit the claim. If the prior art structure is capable of performing the intended use, then it meets the claim.

It is the examiner's position that the preamble does not state any distinct definition of any of the claimed invention's limitations and further that the purpose or intended use, i.e. the dose, recited in the present claims does not result in a structural difference between the presently claimed invention and the prior art parison and further that the prior art structure which is an article identical to that set forth in the present claims is capable of performing the recited purpose or intended use.

26. In regards to claims 13-14 Examiner also points out that the recitation in the claims that the article is "for a dose" is merely an intended use. Applicants attention is



drawn to MPEP 2111.02 which states that intended use statements must be evaluated to determine whether the intended use results in a structural difference between the claimed invention and the prior art. Only if such structural difference exists, does the recitation serve to limit the claim. If the prior art structure is capable of performing the intended use, then it meets the claim.

It is the examiner's position that the intended use recited in the present claims does not result in a structural difference between the presently claimed invention and the prior art and further that the prior art structure is capable of performing the intended use. Given that Kudert et al. disclose a multilayer object as presently claimed, it is clear that the object of Kudert et al. would be capable of performing the intended use, i.e. acting as a precursor to a container, presently claimed as required in the above cited portion of the MPEP.

However, it is noted that "the arguments of counsel cannot take the place of evidence in the record", *In re Schulze*, 346 F.2d 600, 602, 145 USPQ 716, 718 (CCPA 1965). It is the examiner's position that the arguments provided by the applicant regarding the fact that a parison and a dose would not be the same, nor would they have the same ability to form a container must be supported by a declaration or affidavit. As set forth in MPEP 716.02(g), "the reason for requiring evidence in a declaration or affidavit form is to obtain the assurances that any statements or representations made are correct, as provided by 35 U.S.C. 24 and 18 U.S.C. 1001".

27. In regards to Applicant's arguments concerning the Van Schaftingen reference Examiner points out that claim language used by Applicant does not eliminate the

possibility of other steps, nor does the apparatus eliminate the possibility of other steps or components. Examiner also points out that Van Schaftingen reference is a process for making a hollow body (ABS) and a hollow body is described as any article with a surface with a hollow or concave part, which would include a dose (column 1 line 65 column 2 line 7).

### ***Conclusion***

28. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ERIK KASHNIKOW whose telephone number is (571)270-3475. The examiner can normally be reached on Monday-Friday 7:30-5:00PM EST (First Friday off).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Callie Shosho can be reached on (571) 272-1123. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Erik Kashnikow  
Examiner  
Art Unit 1794

/Callie E. Shosho/

Supervisory Patent Examiner, Art Unit 1794

